NO. 21687

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM LYLE BOYLE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On March 16, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in four counts charging appellant with violation of Title 26, United States Code, Section 7206(1). Counts One and Two alleged that appellant wilfully and knowingly filed an income tax return for the years 1959 and 1960 in his and his wife's name and verified by the appellant's written declaration that they were made under the penalties of perjury. These counts further charge that appellant did not believe these returns to be true and correct as to every material matter, in that

he had received income additional to that stated in the returns in the form of fees from Edwin L. Barkley and Barkley Pipeline Construction, Inc , in the amounts of $9,975.47 and $9,472.04, respectively. Counts Three and Four charge that appellant filed amended returns for the years 1959 and 1960 with declarations that they were being made under the penalties of perjury, and which the appellant did not believe to be true and correct as to every material matter in that he had received income additional to that stated in the amended returns in the form of fees from Edwin L. Barkley and Barkley Pipeline Construction, Inc., in the same amount stated above [C. T. 2-6]. 1/

On April 4, 1966, appellant was arraigned and pleaded not guilty to all counts [C. T. 7].

On May 13, 1966, appellant filed a motion to dismiss the indictment and motion to suppress evidence under Rule 41(e) of the Federal Rules of Criminal Procedure [C. T. 8-55]. The motion to suppress was denied by the Honorable Francis C. Whelan, United States District Judge on May 23, 1966 and again denied by the trial judge at the time of trial [C. T. 123; R. T. 10-11]. 2/

On May 23, 1966 a jury trial was commenced before the Honorable Russell E. Smith, United States District Judge, and on May 24, 1966, the jury returned a verdict of guilty on all counts.

The Court denied appellant's motion for a new trial on

1/ C. T. refers to Clerk's Transcript.

2/ R. T. refers to Reporter's Transcript.

July 11, 1966. On this date appellant was sentenced by the court to the custody of the Attorney General for a period of one year on each of Counts One, Two, Three and Four, to begin and run concurrently. Execution of the sentence was suspended on the condition that he be confined in a jail-type institution for a period of 90 days, and placed on probation for the remainder of the term imposed [C. T. 127]. On July 20, 1967, appellant filed a timely notice of appeal [C. T. 128].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231 and Title 26, United States Code, Section 7206(1). Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 26, United States Code, Section 7206(1) provides in pertinent part as follows:

> "Any person who
>
> "(1) willfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony. . . ."

III

QUESTIONS PRESENTED

A. Does appellant having standing to object to a search and seizure of premises and property which he does not own, control or possess?

B. Was the evidence obtained by state authorities pursuant to a search warrant issued by a state judicial officer lawfully seized and therefore properly admitted into evidence?

C. Were statements made by appellant to state authorities in the Board of Directors' office of his employer properly admitted into evidence?

IV

STATEMENT OF THE FACTS

The essential facts surrounding the commission of this offense are not in dispute. On or before April 15, 1960, a 1959 United States individual income tax return was timely filed in the Los Angeles Internal Revenue District by appellant William L. Boyle on behalf of himself and his wife, Geraldine Boyle. On or before April 15, 1961, a similar return was filed by Mr. and Mrs. Boyle. On or about May 26, 1964, an amended return and claim for refund for the year 1959 was filed by the two parties and on or about May 28, 1964 they filed a similar amended return for the year 1960. The 1959 and 1960 individual returns were personally

prepared by the appellant, and he [R. T. 105, 106] supplied all the information for the amended returns and claims for refunds for the years 1959 and 1960 [R. T. 18, 19].

Sometime before October 9, 1961, John Gier, an investigator for the Orange County District Attorney's Office, began an investigation into the business activities of one Edwin I. Barkley in connection with his Barkley Pipeline Company and Mesa Pipe Line and Supply, Inc. account with the Midway City Sanitation District [C. T. 18, 19]. Appellant William Lyle Boyle was employed as manager of the Midway City Sanitation District [R. T. 79, 80]. This investigation had led officers to believe that Edwin L. Barkley had committed theft by overcharging for services rendered to Midway City Sanitation District through falsification of billing records and accounts [C. T. 19]. During the course of the investigation, Investigator Gier obtained search warrants for the Barkley and Mesa Pipe Line premises owned by Barkley.

On October 9, 1961 the first of these search warrants was executed by state agents [C. T. 14-16]. The return to this search warrant indicates that among other things, cancelled checks were seized [C. T. 16]. A second search warrant was issued and executed January 18, 1962 [C. T. 20, 21] and once again cancelled checks were seized from the Barkley premises [C. T. 25]. Each of these search warrants were issued for and executed against only property and premises owned and controlled by Edwin L. Barkley.

Apparently some of the cancelled checks seized pursuant

to the search warrant were used by the Government in appellant's trial (Exhibits 9, 10, 11 and 13). However the record does not reveal whether or not any of the Cashier's checks (Government's Exhibits 5-8, 12, 14, 15, 16) or the applications for these checks (Government's Exhibits 5-A - 8-A, 12-A, 14-A, 15-A) used by the Government in appellant's trial, were seized pursuant to those warrants or were the fruits of the warrants, or whether they were obtained through independent investigation.

In a state proceeding, People v. Barkley and Boyle, in which appellant was tried in a criminal action along with Edwin F. Barkley, evidence seized by Orange County District Attorney's investigators pursuant to the above search warrants was suppressed and charges dismissed [C. T. 31-32, 35].

The cancelled checks, the Cashier's Checks and applications, as well as the tax returns were the documentary evidence introduced by the Government at appellant's district court trial. The individual tax returns and amended returns showed that the gross income of appellant and his wife for the years 1959 and 1960 was $10,154.60 and $11,536.40 respectively [R. T. 7-10]. Evidence introduced by the Government in the form of the above mentioned checks proved that in 1959, appellant received $9,975.47 from Edwin L. Barkley. In 1960, appellant received $9,472.07 from Edwin C. Barkley. These sums are taxable income, a fact not contested in the instant appeal.

A total of eight Cashier's checks and applications were introduced into evidence through the testimony of the Operations

Officer for the Costa Mesa Bank of America [R. T. 24-25]. The checks were applied for and purchased by Edwin L. Barkley. The payee indicated in these checks was appellant. The date, amount and exact payee designation on each of these applications and on the checks are set forth below.

1. Dated 8/7/59 - $1,500, Govt. Exhibits 5, 5-A; Payee - Boyle Surveying [R. T. 24]
2. Dated 9/4/59 - $997.00 - Govt. Exhibits 6, 6-A; Payee - W. Lyle Boyle, Surveyor [R. T. 25]
3. Dated 10/2/59 - $2,000 - Govt. Exhibits 7, 7-A; Payee - W. Lyle Boyle [R. T. 25]
4. Dated 11/6/59 - $1,982.47 - Govt. Exhibits 8, 8-A; Payee-Boyle Surveying Service [R. T. 25, 26]
5. Dated 3/4/60 - $1,206.00 - Govt. Exhibits 12, 12-A; Payee - Boyle Survey [R. T. 26]
6. Dated 8/12/60 - $211.00 - Govt. Exhibits 14, 14-A; Payee - Boyle Survey Service [R. T. 26]
7. Dated 10/14/60 - $1,000 - Govt. Exhibits 15, 15-A; Payee - Boyle Survey Service [R. T. 26, 27]
8. Dated 11/10/60 - $950 - Govt. Exhibits 16, 16-A; Payee - Boyle Survey Service [R. T. 27].

The following cancelled checks drawn on the account of Barkley Pipeline Construction Incorporated, Edwin L. Barkley, were also introduced.

9. Dated 12/17/59, $2,496.00 - Govt. Exhibit 9; Payee W. Lyle Boyle, Licensed Land Surveyor [R. T. 28]

10. Dated 1/12/60, $2,187.62 - Govt. Exhibit 10; Payee - W. Lyle Boyle, Licensed Land Surveyor [R. T. 29]

11. Dated 1/16/60, $2,383.00 - Govt. Exhibit 11; Payee - W. Lyle Boyle, Licensed Land Surveyor [R. T. 29]

12. No date, $1,534.45 - Govt. Exhibit 13 [R. T. 46].

Evidence at trial showed that in addition to purchasing the Cashier's checks, Edwin L. Barkley personally prepared the commercial checks (Govt. Exhibits 9, 10, 11, 13) to Mr. Boyle, which was an exception to his routine business practice of having his bookkeeper prepare the checks for business expenses. Mr. Barkley instructed his bookkeeper to charge these checks to the bidding and estimating expense account of Barkley Pipeline Construction, Inc., although no bills for services rendered were received from appellant [R. T. 55-57]. Although these payments were for the ostensible purpose of survey work done by appellant, the appellant had ceased working as a surveyor in 1952 [R. T. 119].

Appellant received all of the above checks and personally cashed them [R. T. 39, 40, 46].

In October of 1961, two investigators for the Orange County District Attorney's Office interviewed appellant in the Board of

Director's Room at the Midway Sanitation District, his place of employment [R. T. 61, 62, 63]. At this time appellant stated he was quite sure he had declared payments from Mr. Barkley on his federal tax returns, but had probably forgotten them in his state returns [R. T. 64].

At trial appellant maintained that the payments from Barkley were loans and were not income of any type [R. T. 74-163].

V

ARGUMENT

A. THE DISTRICT COURT PROPERLY ADMITTED DOCUMENTARY EVIDENCE SEIZED BY STATE AUTHORITIES PURSUANT TO SEARCH WARRANTS WHERE APPELLANT HAD NO INTEREST EITHER IN THE PREMISES SEARCHED OR THE PROPERTY SEIZED.

1. Previous Suppression of Documentary Evidence By the California State Court is Irrelevant, Since the Federal Court Must Make an Independent Inquiry Under Federal Standards of Admissibility.

At the outset it must be noted that appellant does not here challenge sufficiency of the evidence to establish his guilt. Appellant argues that evidence was improperly admitted because of an unlawful search and seizure by state authorities and because state authorities did not warn appellant of his constitutional rights prior

to obtaining certain admissions subsequently used in the trial below.

Appellant evidently contends that Government Exhibits 5-16 were a product of the two search warrants executed by state officers (Appellant's Brief 5-6). However, the record indicates only that Govt. Exhibits 9, 10, 11 and 12 were seized pursuant to those warrants (at p. 6, supra).

Under the Elkins doctrine, previous suppression by a state court of evidence introduced in appellant's United States District Court trial would not affect its admissibility in the later federal case.

In Elkins v. United States, 364 U.S. 206, 4 L. Ed. 2d 1669 (1960), the Supreme Court overruled the so-called "silver platter" doctrine, which had permitted the federal government "to avail itself of evidence improperly seized by state officers operating entirely on their own account". Byars v. United States, 273 U.S. 28 (1927). Under the Elkins rule:

> " . . . evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial. In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or

not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. at pp. 223-224. (emphasis added)

Thus it is irrelevant in federal court that the evidence in question was suppressed by the California state courts. Under the Elkins rule, it is the duty of the federal court to make an independent inquiry into the admissibility of the evidence, and "The test is one of federal law".

The Elkins rule has been consistently followed in the Ninth Circuit since its announcement.

Smith v. United States, 321 F.2d 427 (9th Cir. 1963);

Hill v. United States, 374 F.2d 871 (9th Cir. 1967).

2. Under Federal Law, Appellant Does Not Have the Requisite Standing to Object to Evidence Obtained Through Search and Seizure by State Authorities of Premises and Property Possessed, Owned, and Controlled by Another Person.

Rule 41(e) of the Federal Rules of Criminal Procedure

provides in pertinent part:

> "A person aggrieved by an unlawful search and seizure may move . . . to suppress for use as evidence anything so obtained . . . ."

In the landmark case of Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), the Supreme Court said at page 261:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' Hatch v. Reardon, 204 U.S. 152, 160. The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property. They are not exclusionary provisions against the admission of kinds of evidence deemed inherently unreliable or prejudicial. . . ."

In the case at bar, the evidence was seized from premises in which appellant claims no interest whatsoever, possessory or otherwise. Nor does appellant claim an interest arising out of his presence on the searched premises at the time of the search. Finally, appellant does not claim and cannot claim that the search was "directed" at him - the record is clear that the search was part of an investigation of another person, Edwin Barkley, who was suspected of theft. Rather, appellant's claim is based in the first place upon an alleged ownership in the property seized.

The items complained of fall into three categories: (1) applications for cashier's checks by one Edwin L. Barkley; (2) cashier's checks drawn on the Bank of America and payable to appellant or to "Boyle Surveying"; and (3) personal checks of Barkley Pipe Line Construction, Inc., drawn on the Bank of America and payable to appellant or "Boyle Surveying". As to the first category, the applications for cashier's checks, appellant makes no claim of standing, and clearly could not do so. The only persons who could possibly assert any interest in these documents are the bank.

Appellant does claim an interest sufficient to give standing as to the checks, based on the fact that he endorsed the checks in blank and transferred them, presumably for consideration, thereby warranting good title under section 3-417(2) of the Uniform Commercial Code, Cal. Comm. Code, Section 3417(2). This argument has no merit. The checks in question were presented to the payor bank, accepted, paid, cancelled, and returned to the

maker in the ordinary course of business. A transfer for value by a holder in due course transfers all of the transferor's right, title and the interest in the paper to the transferee. U.C.C. §§ 3-201, 3-301, 3-302, 3-305; Cal. Commercial Code §§ 3201, 3301, 3302, 3305.

Moreover, cancellation of the checks by the payor bank distinguishes the liability of all prior endorsers. U.C.C. §3-605(a); Cal. Commercial Code §3605(a). Thus, at the time of the seizure, the appellant had no right, title, or interest in these checks, nor, indeed, any liability on them.

Appellant makes the further argument that since evidence of unexplained funds in the hands of a taxpayer establishes a prima facie case of understatement of income, Davis v. United States, 226 F.2d 331 (6th Cir. 1955), cert. denied 350 U.S. 965, reh. denied 351 U.S. 915, he is in the position that his conviction would "flow from his possession". Therefore, appellant argues, he is entitled to object under this Court's decision in Diaz-Rosendo v. United States, 357 F.2d 125 (9th Cir. 1966). Appellant's reliance on Diaz-Rosendo is misplaced. In the first instance, the "possession" which is the subject of discussion in Diaz is actual or constructive possession of contraband articles. Thus the possessed article is the crime. In this case the possessed article, checks or proceeds, do not constitute the crime since the crux of the offense is a false statement knowingly made on an income tax return.

Nor can appellant logically contend that he had actual or

constructive possession of the seized checks. It is clear that his possession of the proceeds received when he cashed the checks did not confer direct or indirect control or power of disposition of the check document.

Additionally, the record does not reflect that the above stated prima facie instruction was proffered by either party or given to the jury [C. T. 63-163; R. T. 211-232]. Under these circumstances the jury would necessarily have based their decision on evidence other than the fact that appellant did not explain funds in his possession.

Furthermore, the Diaz-Rosendo doctrine requires that his conviction flow from possession at the time of the search, not simply possession. This is clearly shown by the holding in the Diaz-Rosendo case itself:

> "Applying the teachings of Jones and Wong Sun neither appellant was on the 'premises' (the Buick automobile of Contreras) where the search occurred and their conviction did not flow from the possession by either one of them of the marijuana at the time of search. The appellants come squarely within the language of Jones which put them in the category of those 'who claim prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.' Likewise these appellants are in the position of Wong Sun since 'no right of privacy of person or

premises' of theirs was invaded 'which would entitle (them) * * * to object' to the use of the marijuana and the piece of paper as evidence in their trial."

Diaz-Rosendo v. United States, supra, p. 32 (emphasis added).

This Court has recently re-affirmed its position that the conviction-flowing-from-possession doctrine applies only to one who has possession at the time of search. Hill v. United States, 374 F.2d 871 (9th Cir. 1967).

In Hill the appellant caused records of a corporation of which he was President and owner to be turned over to a partnership in which he had no interest. These files were later obtained by state authorities, and the Ninth Circuit Court of Appeals assumed that the records were obtained in violation of the Fourth Amendment to the Constitution. After the files were used in a local prosecution against the appellant they were turned over to federal authorities and admitted in his federal prosecution. The Court held that the partnership was the "victim of the seizure (the one against whom the search was directed)" while appellant was "one who claims prejudice only through the use of evidence gathered as a consequence of a search directed at someone else". Hill, supra, at p. 873. Thus mere possession of evidence at some time prior to arrest or seizure did not confer standing on the appellant in Hill, nor does it confer standing on the appellant in this case.

The Court's approach in these cases is clearly a correct

application of the exclusionary provisions of Rule 41(e), in light of the policy underlying that rule as explained in Jones v. United States, supra. That is, the rule is designed only to protect the right of privacy guaranteed by the Fourth Amendment. One whose privacy has in no way been invaded cannot invoke the protection. The present appellant is such a person, and it is submitted that under the Diaz-Rosendo and Hill cases, appellant had no standing to object to the use of this evidence.

3. Under Federal Law, the Search and Seizure Were Lawful.

a. The Affidavit in Support of the Applications For Search Warrants Set Forth Sufficient Probable Cause.

It is well-settled law that an affidavit setting forth mere information and belief is insufficient to sustain a search warrant.

Jones v. United States, supra;

Nathanson v. United States, 290 U.S. 41 (1933).

The affidavit must either be based upon the personal knowledge of the affiant, in which case some of the underlying facts must be stated, or if it be based upon information gained from informants, underlying circumstances must be shown to support the credibility and reliability of the informants.

Jones v. United States, supra;

United States v. Ventresca, 380 U.S. 102 (1965);

Travis v. United States, 362 F.2d 477

(9th Cir. 1966).

As the Court said in Ventresca:

"Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police. . . . Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." 380 U.S. at p. 109. (emphasis added)

In the instant case, the affidavit in support of the first search warrant set forth detailed facts and circumstances with regard both to the affiant's personal knowledge and to the information supplied by the informants. In support of his belief, the affiant recited:

" . . . personal observation of the Barkley Pipe Line Company bank account in the Costa Mesa branch of the Bank of America and a carbon copy of a cashier's check from Edwin L. Barkley payable to the order of W. Lyle Boyle, superintendent of the Midway City Sanitary District."

In addition to this personal knowledge, the affiant's informant,

> " . . . actually observed the billing made to the Midway City Sanitary District for July, 1961, approximately $1300.00, and knew that it was incorrect as he had serviced the machinery listed in the billing, and he knew this machinery to be on location for the Midway City Sanitary District for only eleven hours during July, 1961, and the bill should have been not over $200.00. . . ."

This latter statement alone contains within it all of the elements which the Supreme Court has said to be necessary. The facts themselves are clearly set forth; and the informant is sufficiently identified as a machinery service mechanic for the magistrate (in this case, a Municipal Court judge) to be able to evaluate his peculiarly knowledgeable position vis-a-vis the facts alleged. Moreover, the type of information and the very nature of the facts themselves lends them credibility; here we have not a revelation of secret transactions in the underworld by an informant who himself participated in the criminal transaction, but rather the informant appears to be a law-abiding citizen exercising his duty to come forward with facts indicating a criminal venture in which he took no part. The recital of circumstances easily verifiable - the amount of the bill to the Sanitary District is ascertainable from an examination of the records of that public agency,

and the location of machinery could hardly go unnoticed. Thus the situation here is not unlike that presented in Smith v. United States, 321 F. 2d 427 (9th Cir. 1963), in which this Court found probable cause in a bare recital of certain facts ascertainable from public records, without any statement by the affiant as to how he had actually learned said facts.

Under Ventresca, warrants are given a preference; doubtful cases are to be decided in favor of admission of evidence seized pursuant to a search warrant signed by a detached judicial officer. Moreover, the affidavits are to be read in a commonsense way, not overly technical. It is therefore submitted that in view of Ventresca and Smith, the affidavit here in question satisfied the federal requirements of probable cause.

b. The Items to be Seized Were Described With Sufficient Particularity.

Appellant contends that the description of property to be seized under the search warrant was not sufficiently particular, in that it listed, inter alia, cancelled checks and books and records of the business. In support of this contention, appellant relies primarily on Aday v. Superior Court, 55 Cal. 2d 789 (1961), and Stanford v. Texas, 379 U.S. 476 (1965).

It is significant, however, that the cases relied upon by appellant all involved criminal prosecutions in which the court viewed the search and seizure, and the prosecution itself, as

impinging on the right of free speech guaranteed by the First Amendment. Indeed the nature of the crime charged has little connection to financial records whereas the instant case as well as the theft investigation was founded on financial transactions and records. Under such circumstances, all the financial records of the business are clearly relevant and material to the offense. Thus the situation here is not unlike that in Marron v. United States, 275 U.S. 192 (1927), in which the seizure of ledgers and other records including even utilities bills, was held lawful, where the seizure was incident to an arrest for operating an illegal still.

The search and seizure in this case did not constitute a mere fishing expedition, as appellant would have it, but was clearly directed to materials pertinent to the offense, and described as particularly as is possible. The Supreme Court itself recognized this distinction in Stanford v. Texas, where it pointed out that:

> "The word 'books' in the context of a phrase like 'books and records' has, of course, a quite different meaning. A 'book' which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case." 379 U.S. at page 485 (fn. 16)

B. STATEMENTS OF APPELLANT MADE TO STATE AGENTS INVESTIGATING ANOTHER PERSON FOR A STATE OFFENSE UNRELATED TO A FEDERAL CRIME WERE PROPERLY ADMITTED INTO EVIDENCE.

Appellant contends that his statements elicited in an interview with investigators from the Orange County District Attorney's Office were inadmissible under the doctrine of Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). In this statement appellant said that he was certain that he had declared payments from Barkley on his federal tax return but that he probably forgot to include them in his state return [R. T. 64].

The interview in this case would hardly seem to fall within the factors requiring exclusion in Escobedo. Initially it must be noted that the investigation was wholly unrelated to the charges culminating in appellant's federal prosecution. The crime under investigation was the state offense of grand theft. Any admission of appellant with regard to the federal crime of tax evasion was purely ancillary to the inquiry concerning the theft charge. No investigation could have begun to "focus" on the appellant as a particular suspect, much less be in the accusatory stage", since no investigation was being conducted concerning his tax returns. Nor can it be said that the agents were carrying out a process of interrogation that lent itself to eliciting incriminating statements.

In a similar case, Miller v. United States, 354 F. 2d 801 (8th Cir. 1966), state agents interviewed the appellant concerning

abortion charges and in the process obtained admissions later used in a federal tax evasion prosecution. The court distinguished Escobedo, since, as in the instant case, something less than a confession was involved. An even more significant distinction was found in the fact that the income tax case against appellant had not entered the accusatory stage at the time she was questioned by state officers. The court stated:

> "We are unwilling, in the absence of cogent reasons to the contrary, to say that when the accused is the focus of one crime (here abortion), admissions as to another completely unrelated crime (here tax evasion) the commission of which is unknown to the investigating officers, will be inadmissible into evidence as falling within the blanket exclusionary rule of Escobedo. The Escobedo defendant had clearly become the accused in the murder charge for which he was eventually tried, and his admissions related to the murder charge. This is not the situation herein." 354 F. 2d 806.

The record does not indicate even that appellant was under investigation on the state theft charges. The search warrant affidavit of investigator Geir shows only that the checks from Barkley to Boyle were evidence of Barkley's overbilling (Appellant's Brief, p. 27; C. T. 18-19). There is nothing to indicate that the interview was other than an attempt to garner more evidence

against Barkley concerning the alleged theft activities. Similarly there is nothing to indicate that appellant was a suspect at all prior to the interview.

Appellant's contention that he had been "taken into police custody" under Escobedo is without foundation. Appellant was manager of the Midway City Sanitary District [R. T. 79, 80]. In light of this fact it can hardly be said that the Board of Director's Office of that agency "is as foreboding and confining as any office in a police station" (Appellant's Brief, p. 28). Nor is there anything in the record to indicate other than that appellant willingly invited officers into the comfortable surroundings of the Board of Director's Office. On the contrary, it would seem more likely that appellant felt that he could ask the investigators to leave the premises of his employer at any time.

Even assuming for purposes of argument the instant case was factually within the holding of Escobedo, it has repeatedly been held in the Ninth Circuit and other federal circuits that Escobedo has no application to Federal Tax Fraud Investigations where the accused has neither been indicted nor arrested at the time of the interview.

Kohatsu v. United States, 351 F. 2d 898,
cert. denied 384 U. S. 1011 (9th Cir. 1965);
United States v. Fiore, 258 F. Supp. 435
(D. C. W. Penn., 1966);
Mathes v. United States, 376 F. 2d 595
(5th Cir. 1967);

United States v. Mancuso, 378 F.2d 612
(4th Cir. 1967);
Selinger v. Bigler, 377 F.2d 543 (9th Cir. 1967);
Rickey v. United States, 360 F.2d 32
(9th Cir. 1966).

CONCLUSION

Appellant does not challenge the sufficiency of the evidence of guilt but contends that certain evidence used to prove guilt beyond a reasonable doubt should have been excluded by the trial court. However, appellant has no standing to challenge admission of documentary evidence obtained from the premises of Edwin Barkley by state agents pursuant to search warrants. Appellant had no interest in the premises searched; was not present on Barkley's premises at the time of the search; and the search was not directed at him. Nor did appellant have an interest sufficient to confer standing to challenge the admission of the negotiated and cancelled checks which were seized from Barkley's business files during the search.

Under federal standards of admissibility, the search pursuant to warrants issued by a detached judicial officer was lawful in all respects. Keeping in mind that marginal cases must be determined by the preference to be accorded to warrants, the affidavit stated sufficient probable cause both with regard to the affiant's personal knowledge and to the information supplied by

informants. The items to be seized were described with sufficient particularity in view of the fact that all the financial records of the business are clearly relevant and material to the offense under investigation at the time of the search.

Statements of appellant made to state agents were properly admitted over objection on Escobedo grounds. The record does not reveal whether or not appellant himself was being investigated for any crime, or if he was, it was for a state crime unrelated to the federal charges involved in this case. Under these circumstances it can hardly be said that an investigation had "focused" on appellant or that state agents had initiated a process tending to elicit incriminating statements. Moreover, since the interview was held in the office of appellant's employer, the contention that appellant had been taken into police custody is without foundation.

Since the record reflects that all evidence was properly admitted by the trial court, it is respectfully requested that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir
MICHAEL D. NASATIR